DOMESTIC RELATIONS COMMITTEE

Amended Meeting Minutes – October 17, 2003

PRESENT:

CO-CHAIRS:

- ■ Hon. Mark Anderson, Co-Chair
- ■ Hon. Karen Johnson, Co-Chair

MEMBERS:

- ■ Hon. Karen Adam
- ■ Hon. Bill Brotherton
- ■ Sidney Buckman (Designee Pam Frye)
- ■ Kat Cooper
- □ Frank Costanzo
- □ William Fabricius
- ■ Hon. Beverly Frame
- ■ Nancy Gray
- ■ Bill Hart (Designee Analisa Alvrus)
- □ Terrill J. Haugen
- □ Jennifer Jordan
- ■ Ella Maley
- □ Hon. Dale Nielson
- ■ David Norton
- □ Steve Phinney
- □ Beth Rosenberg (Designee Judy Walruff)
- ■ Janet Scheiderer (Designee Theresa Barrett)
- □ Ellen Seaborne
- □ Kelly Spence
- ■ Steve Wolfson
- ■ Debbora Woods-Schmitt
- ■ Brian Yee
- ■ Jeff Zimmerman

GUESTS:

Mike Dunbar	2nd Spoken Voice
Martin Susnjara	Self
Kathy	Dept. of Economic Security
Jack Levine	Self
Daniel Cartagena	Parent
Ruth Hoan	Self

STAFF:

Isabel Gillett	Administrative Office of the Courts
Marianne Hardy	House of Representatives
Megan Hunter	Administrative Office of the Courts

Rep. Johnson opened the meeting at 10:21 a.m. without a quorum present.

JOINT CUSTODY PRESENTATION & DISCUSSION

Stephanie Walton, Policy Specialist, National Conference of State Legislatures (NCSL), Denver, Colorado was invited to provide information regarding joint custody laws and experiences in other states. NCSL provides resources to state legislators and staff nationwide. They provide on-site technical assistance in the form of education presentations to testimony before a legislative committee to roundtable discussions with experts they bring in to assist in understanding a particular issue. Assistance is provided at no charge to any state.

Ms. Walton compiled a sampling of other states' statutes and provided an overview of those laws and the lessons learned in those states. Presumptive Joint Custody can be divided into two main categories: states that have a general presumption for joint custody and states that have a presumption only if the parties agree. Eleven states and the District of Columbia have a general presumption; six states have eliminated their general presumption, although joint custody is still an option. Two states that eliminated their general presumption moved to a presumption if the parents agree. Twelve states have a presumption if the parents agree. Two states, Vermont (presumption for joint) and Oregon (no presumption), in addition to these twelve, require the parents to agree before joint custody can be ordered.

These laws contain several common elements: most refer to joint legal custody rather than joint physical custody. Joint legal custody refers to joint decision making; parents must consult each other and agree on major issues such as education, child care, religious training and other decisions. Joint physical custody refers to cases where children spend a substantial amount of time with each parent. Most laws contain a domestic violence exception. In some states, joint custody is not awarded when parents live too far apart or they have an inability to cooperate with each other. Six of the states that have a general presumption for joint custody also have legislation requiring parenting plans: District of Columbia, Kansas, Minnesota, Missouri, New Mexico and Wisconsin.

Ms. Walton commented that societal conceptions regarding custody have changed substantially in the past decade. Studies show that more fathers are gaining custody of their children. In addition, there have been steady increases in the past years in shared custody arrangements. The number of fathers who report no contact with their children has steadily decreased, and more fathers report being regularly involved in their children's lives.

Advocates for fathers have argued, successfully in many states, that the traditional concept of custody and parenting time unfairly denigrates noncustodial parents and implies that they are somehow unfit. In response, a number of states have changed language in their statutes, and now refer to shared parenting or parenting time rather than custody and visitation. States have enacted more substantive changes also, such as emphasizing a closer to equal time split between parents, whether or not it's called "joint custody."

Ms. Walton discussed current research on the effects of divorce on children. Most research clearly shows the negative impacts; however, a closer look at this research reveals a more complicated picture. Not all children suffer the same adverse consequences, and in some instances, children of conflicted parents start showing negative effects before actual divorce or separation. High conflict between parents appears to be the most significant factor creating problems for children. Economic realities and relocation significantly impact children as well.

A number of studies examine what arrangements work best for children and parents after the parents are no longer together. Some studies suggest that children are better off if they have substantial continuing involvement with both parents. However, children who are exposed to high levels of parental conflict are negatively affected, so they may be better off in sole custody arrangements if the parents cannot get along.

Increased parental involvement improves children's well-being in a more direct way. There are several studies that show that parents who are more involved are more likely to pay child support, which increases the financial resources available. One study found that in joint custody situations, both parents expressed dissatisfaction with the amount of time they had their children, vs. sole custody where the primary custodian was satisfied with the time split, but the parent without custody was not. In the joint custody situations where high conflict was not present, parents did acknowledge that the children were doing well.

Research also has identified a number of common factors contributing to the success of joint custody arrangements. The most important factor appears to be parental willingness to cooperate for the sake of the kids. Generally, joint legal custody is not successful unless the child is also spending substantial amounts of time with both parents. Geographical proximity is important for practical reasons and works better in middle to high income families. Research shows that joint custody arrangements raised the overall cost of raising children, because of necessary cost duplication.

Ms. Walton provided anecdotal, unscientific evidence gleaned from states which have joint custody laws, as follows:

Idaho - general presumption for joint legal custody. Most parents have a standard visitation schedule. Officials report that this can cause problems because parents generally assume that joint custody refers to joint physical custody. A few judges commented that the presumption actually leads to more conflict in custody cases, because parents do not understand the distinction between joint legal and joint physical custody.

Texas - general presumption for joint custody which they label "Joint Managing Conservatorship." The statute refers to legal decision making, not physical time. Parents are given two options for physical custody: a standard schedule or extended standard schedule. The majority of parents choose the extended standard schedule which gives the non-primary parent about 44% of time with the child over a two-year period. The presumption is removed if there is a history or pattern of domestic violence.

California - presumption for joint custody if both parents agree. Judges do not give the presumption much weight; instead, they focus very heavily on the best interest of the child, as outlined in statute. Judges will not override parents' wishes if they have an agreement, unless there are very compelling reasons, such as a clear chance of harm to the child. A 1991 study found that less than one family in six in Los Angeles County has joint physical custody, with only one in ten having a 50/50 time split. However, the majority of cases did have joint legal custody. This data is only based on one county and is ten years old, so it is not representative of what is going on in California today.

Washington -presumption for joint custody if the parents agree. The state also passed comprehensive parenting plan legislation in 1988, and commissioned an in-depth study of their parenting plan legislation in 1998. Focus groups were conducted with parents and family law professionals including judges, guardian ad litem's, domestic violence advocates and others. Parents report that most cases have standard visitation. Of the sample cases, 45% had a primary residential parent and a standard visitation schedule of every other weekend, plus a mid-week evening meeting with the other parent. Fewer than 7% had 50/50 visitation schedules. 27% had less than the standard visitation schedule. 19% didn't specify the visitation schedule but left it to the parents to determine. Joint decision making is more common in parenting plans. Over 75% of the sample cases specified joint decision making. Parents in the focus groups report that joint decision making is impractical and that in most cases the primary parent makes most of the decisions concerning the children. Parents who were victims of domestic violence reported that their former partners frequently used the civil justice system to further threaten and harass them, and the professionals interviewed for the study agreed.

Parents also reported that they had little guidance in the divorce and custody process, which may be part of the reason that so many ended up with standard visitation schedules. More and more divorce cases are *pro se*, and parents are not getting adequate information to help them through the process. Even when parents have legal representation, attorneys often advise clients to stick with the standard schedule because they believe it is better for the kids. There was a consensus within the professional group that the children spending more substantial time with the noncustodial parent was disruptive for children and not as good for them as having the basic standard visitation where most time is spent with one parent.

Members commented that the majority of cases in Arizona's family court are filed by self-represented litigants. Approximately, 40-50% of those cases are resolved by default. A presumption would give joint custody to a party who is not even interested in responding to a petition. Plus, parenting plans are required by statute in joint custody cases, which means every custody case, under the presumption, would be required to have a parenting plan. This could create a nightmare for the courts.

A quorum was reached at 10:46 a.m.

APPROVE MINUTES

MOTION: A motion was made by Debbora Woods-Schmitt and seconded by Brian Yee to approve the minutes with one spelling change on page 4. Unanimous approval.

DEDICATED FAMILY BENCH

Megan provided a brief report on a meeting held between Chief Justice Jones, Vice Chief Justice McGregor, AOC representatives, Judge Campbell and Judge Armstrong from the Superior Court in Maricopa County and Judge Warner from the Superior Court in Pima County. Judge Leonardo was not at the meeting but had shared his thoughts previously.

Megan reported that the courts in Pima and Maricopa counties had improved tremendously over the past 3 years, including a reduction in waiting periods. The key issues and concerns regarding discussed in this Committee and by the courts are: 1) getting judges who want to be on the family bench rotation, and 2) keeping them on the family law bench. Options discussed by the courts are:

Issue 1: Getting judges who want to be there.
Options: Announcing vacancies will be on family court, talk to trial court commission about the issue, craft questions for the interviewees about their awareness of the possibility and reality of being rotated in several areas of the law, including family law.

Issue 2: Keeping judges on the family bench.
Options: incentives such as increased vacation time, more conferences, sabbatical (to prevent burnout).

The next steps to take are as follows:

1. Judges talk to the trial court commission in November,
2. Continue meeting to come up with best solutions,
3. Will report to this Committee at each meeting.

Rep. Johnson would like to see this proposal accomplished through court policy, but believes it is a great problem and may need legislation. She suggested forming a separate judicial commission whose sole purpose would be to appoint family court judges.

Mr. Wolfson commented that a separate appointment commission may be too unwieldy. He expressed disappointment with the solutions offered by the court and is not convinced that some of the softer approaches will work and suggested looking at and addressing the core issues to find a solution in an effort to instill confidence in the judiciary from the perspective of the public. Rep. Johnson commented that few family law attorneys apply for a bench appointment because they are discouraged from applying. She is also concerned that little consideration is given to appointments to the family bench in light of the family and juvenile caseloads comprising at least 50% of the entire court caseload.

Mr. Wolfson said the perception is that the message from the bench is negative. A question or two during the appointment process is not going to affect the turn-around in having individuals who not only have the experience and knowledge of what the family law practice is about, but also have an interest in serving on at least a longer term basis. There is not a simple fix. The majority of people currently serving on the bench have employment experience either with the public defender's office or the county attorney's office.

Sen. Brotherton asked Mr. Wolfson whether attorneys have indicated why they do not apply to the bench. There are a few people recently who have gone through the process who have family law background, but those applicants are minimal because of the perception that it is too difficult to get through that process, and that their skills will not necessarily be utilized in that area.

Sen. Brotherton commented that, in general, law is a well-paying job for many people. Many lawyers who apply for a bench appointment are from the public defender's office or county attorney's office and apply because it is a step up for them. Private attorneys would likely experience a significant cut in pay.

Rep. Johnson spoke about lengthening time served on family court bench. She asked if it would be helpful for a judge to remain for five years on the family rotation. Mr. Wolfson said at the very least. He noted that Judge Armstrong said that people only want to be on the bench for two years, and that most senior judges have refused to return to the family bench. The court is going to have to take a firmer position with the bench to assign at least a presumptive four-year term.

Commissioner Adam commented, upon request, that she likes being a family law judicial officer and commented on her experience in Pima County. Commissioners in that county stay on the family bench for an extended time period or rotate between juvenile and family court. They are very well trained. Judges rotate out of family court on a two-year basis, and some of them absolutely do not want to be there. Some judges, though, are very interested in serving on the family bench. Most of the commissioners had family law practices. She said she loves her job, but had no previous family law experience. The people on the trial court commission are trying hard to put the best people on the bench that they can, but the selection process is incredibly political. To get on the trial court commission, members of the Board of Supervisors each have two appointments, and they have to be from two different parties. They appoint commissions to appoint commission members and that process is also highly political. She suggested that the bar, when making an attorney appointment to the commission, make a decision to appoint a family law or juvenile law practitioner. Asking questions at the interview probably is not the panacea. Instead, it is asking the right people the right questions, asking for references. Knowing what the right questions are requires someone on the commission knowing what is involved in that particular area of law so that the kinds of questions are asked. There are big differences between being able to operate effectively as a family law judge or a civil or criminal judge.

Sen. Brotherton said that commissioners serve at the pleasure of the presiding judge. He commented that the presiding judges should not be deferential to judges who do not want to be on the family court bench. The presiding judge should require judges to serve on that bench anyway. A judge should be willing to serve on the family bench or any bench out of their duty to do their job

David Norton commented that the Committee has backed itself into a corner by trying to manage the court's personnel system. He questioned whether it is this Committee's business to be in that position and commented that nothing in this discussion opens an opportunity to solve the problem through legislation. He suggested that the Committee would be best served to collaborate with the courts to find resolution.

Rep. Johnson said that the Committee is in agreement that there is a problem and there has been a problem for a long time. This problem has been brought to the attention of the court in the past, but nothing has been done. She does not want to seek legislation as a first solution, but she wants to see the problem resolved now.

Sen. Brotherton commented on a separation of powers issue. Sometimes the legislature dictates to the court and vice versa. This is the way the system works, and he does not see it changing in the foreseeable future. He believes the best way to look at it is to work in conjunction with the court to collaborate on some resolution.

Mr. Zimmerman said that this issue has become Judge Armstrong's number one issue for Maricopa County's Family Court. Rotation as it is now has to stop, but it has to be accomplished in a way that satisfies the family court judges as well. Mr. Zimmerman suggested that Judge Armstrong be invited to meet with the committee to and give the committee his thoughts on where that process needs to go. Megan will invite Judge Armstrong to speak at the November meeting. She will contact: 1) the National Council on Juvenile and Family Court Judges for current information, and 2) Judge Howard Lipsey, Rhode Island, who has spoken nationally on the creation of a dedicated bench.

Rep. Johnson said that the committee cannot dictate to the court what to do, but perhaps the Committee can impress on the court the need to follow up and make these changes. If the Committee keeps after them, perhaps it will get done. The members of this Committee come from various backgrounds and have a great deal of expertise in this area; if the court hears from all of the members on a consensus basis, perhaps that will have an impact. The Committee reached consensus to invite Chief Justice Jones, Vice Chief Justice McGregor, and the presiding judges and presiding family court judges from Pima and Maricopa County to attend many more meetings with the Committee.

Dr. Yee mentioned that there are several jurisdictions that have an established dedicated family bench. He suggested that Judge Armstrong be asked to comment on a survey of states with dedicated family benches. One factor that has not been mentioned is the possibility of a critical mass issue. At the formation of this Committee, a number of national experts came in to speak about certain peculiarities happening to a system when it reaches a certain size. Maricopa County is at that point. He said there are issues that

Maricopa County faces that Pima County does not. Currently, it takes four-to-six weeks to get on a family court calendar for an order to show cause hearing in Maricopa County, and four-to-six months should be expected for a trial date. Maricopa County now has 32 divisions, but it still is not solving the problem. The workload is at issue. Extending the term to five years does not deal with the real problem. The workload is exceedingly different from all the other assignments. They get to do all of the work: decision maker and fact finder and they are required to manage a case load filled with *pro se* litigants.

Ms. Gray mentioned that Ms. Frame, Clerk of the Court in Yuma County, indicated that the real issue is the overload of cases. She wanted to remind the committee that there are 3,000,000 people in Maricopa County, and there are almost that many in the rest of the state. There are 13 counties that elect judges with as many people as there are in Maricopa. She did not want the committee to forget the other 2 ½ million people in the remainder of the state. The family court in Yuma County is setting trials in February at the present time. The problem is not just Maricopa County.

CALL TO THE PUBLIC

Jack Levine

Mr. Levine, a long-time Phoenix attorney, is in the process of writing an article regarding the Domestic Relations Committee and has written articles in the past regarding the concept of a dedicated bench. He encouraged the Committee to get the Chief Justice behind this effort and try getting a written commitment. He discussed the high burnout in any area when you do not know what you are doing. Judges face this when appointed and assigned to an area that they know nothing about. He listed the most important points the Committee should consider:

- The Commission should affirmatively seek domestic relations attorneys
- The Committee should make Governor aware of the problem
- Domestic relations judicial officers should receive incentives that others judicial officers do not – similar to combat pay in the military
- The merit selection spoils judicial officers

Danny Cartagena

Mr. Cartegena discussed his thoughts on the joint custody proposal. His case was high conflict in nature, but joint custody was eventually granted. He supports a presumption for joint custody because parity would be established from the beginning of the case. Mr. Cartegena also made a specific request concerning the position on the Committee for a domestic violence advocacy group. The seat is filled by a member of the Arizona Coalition Against Domestic Violence currently. That group advocates only for women and children, not men. Mr. Cartagena believes that to be truly representative of all victims of domestic violence, either another membership position should be added to the Committee to represent male victims of domestic violence, or the present position should be filled by an entity that advocates for all victims of domestic violence. Kat Cooper encouraged members to read the materials provided by Mr. Cartagena.

Michael Durham
Mr. Durham discussed the dedicated family bench issue and commented that the behavior of families is very wearing on the bench. The courts are bereft of procedures or tools to calm over-emotional litigants.

CALL TO ORDER
The meeting was reconvened at 1:32 p.m. with Megan Hunter filling in for Rep. Johnson and Sen. Anderson.

FAULT DIVORCE DISCUSSION
Due to a lack of time, this item will be placed on the November agenda.

INTEGRATED FAMILY COURT UPDATE
Due to a lack of time, this item will be placed on the November agenda.

WORKGROUP REPORTS

Substantive Law Workgroup – Jeff Zimmerman
Jeff met with members of the Conciliation Court Round Table in Tucson yesterday. They helped clean up the proposed language from this group, which is intended to assist judges. Instead of going forward with a joint legal and physical custody presumption proposal, a compromise of a joint legal custody proposal may be reached. This is designed to eliminate obstacles to joint custody and places sole custody and joint custody on a similar plane.

Court Procedures – Brian Yee
The group discussed the next steps in terms of taking the dedicated family bench concept through the Committee. They noted that much of the Committee's discussion on the topic of a dedicated family bench has been philosophical, but the practicalities must be addressed as well. The Committee appears to be on board philosophically; now the Committee must recognize the need for resources, training, research, and day-to-day realities of life on the family bench. Megan Hunter will work with Steve Wolfson to get information on the trial court commission appointing process.

CALL TO THE PUBLIC
No requests to speak were received for the call to the public.

NEXT MEETING
The next meeting will be held on November 14, 10:00 am – 2:00 pm at the Arizona Courts Building, 1501 W. Washington, Conference Room 119.

ADJOURNMENT
The meeting was adjourned at 1:58 p.m.